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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 704

RUTH ELKHORN COALS, INC., ET AL., PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court is unreported and is reprinted at R. 85. The opinion of the Court of Appeals (Pet. App. 1a–7a) is reported in 248 F. 2d 635.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957 (Pet. App. 8a). A petition for rehearing, timely filed, was denied on October 10, 1957 (Pet. App. 9a). The petition for a writ of certiorari was filed on January 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the "open market" exemption of Section 9 of the Walsh-Healey Act—considered in the context of the Act as a whole, the basic statutory purposes, and the consistent administrative and Congressional interpretation—extends beyond purchases of such goods as may usually be bought *by the Government* in the open market pursuant to specific statutory authorization.

STATEMENT

This action was brought under the authority of the Fulbright Amendment to the Walsh-Healey Act,[1] which requires that wage determinations "be made on the record after opportunity for a hearing" and authorizes judicial review of "any such wage determination, or of the applicability of any such wage determination" (Section 10 (b), 41 U. S. C. 43a, subsection (b), Pet. App. 11a). On January 1, 1955, the Secretary of Labor duly issued a notice of a public hearing to determine prevailing minimum wages in the bituminous coal industry (R. 2). It began as scheduled on February 1. At the beginning of the hearing, petitioners questioned the jurisdiction of the Secretary to make a wage determination for the bituminous coal industry on the ground that the Walsh-Healey Act was inapplicable to any Government purchases of bituminous coal because of the exemption provided by Section 9, 41 U. S. C. 42, which reads in part (Pet. App. 11a):

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[1] 41 U. S. C. 43a, 66 Stat. 308.

> This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market * * *.

The claim to this exemption admittedly depended upon petitioners' contention that the long-standing consistent administrative construction of the exemption was an erroneous interpretation of the statute. The administrative construction was contained in a formal separate regulation, applicable generally to all industries subject to the Act, which, interpreting the exemption as applicable only to such purchases as the *Government* usually makes in the open market, limited the exemption to the two types of purchases which constitute the usual method of open market procurement by the Government, *i. e.*:

> Where the contracting officer is authorized by the express language of a statute to purchase "in the open market," or where a purchase of articles, supplies, materials or equipment either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R. S. 3709, that is, where immediate delivery is required by public exigency. [Section 201.2 (a), General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR 201.2 (a), Pet. App. 12a.]

The Secretary ruled that the petitioners' challenge of this interpretation was not a matter properly raised in the wage determination proceeding, since the pro-

ceeding was concerned only with fact-finding as to wages, and that the application of the "open market" exemption could only be decided on a case-by-case basis, depending on the terms and circumstances of the particular contracts (R. 11). Extensive evidence was then taken on the question of the "prevailing minimum wages" in the industry, which resulted in the wage determination involved in this case.

Petitioners' complaint in this action for judicial review of the wage determination, under Section 10 (b) of the Act (the Fulbright Amendment), challenged the validity of the wage determination on a variety of grounds, including the disposition of their claim that the Secretary had no jurisdiction by reason of the statutory "open market" exemption. The amended complaint specifically alleged that "in making his determination for the Bituminous Coal Industry," the Secretary had "in effect determined" that the "open market" exemption of Section 9 was not applicable to bituminous coal purchases by the Government (R. 73). In the Court of Appeals, petitioners affirmatively contended that the court should decide the issue of the validity of the Secretary's regulation interpreting the exemption "as a matter of law," asserting that though the Secretary's rulings in the wage determination proceeding "were couched in terms of a refusal to decide whether Regulation 201.2 (a) was a correct interpretation of Section 9, their practical effect was a decision on the merits of the regulation" whereby "the applicability issue was raised and decided adversely at the administrative level, * * * so that the issue is ripe for [judicial]

review" under Section 10 (b) of the Fulbright Amendment (see Appellants' Brief in the C. A. D. C., pp. 20–21, 23).

The District Court granted judgment for the Secretary, declaring the wage determination "to be in all respect valid" (R. 85). The Court of Appeals affirmed, on the ground that, "on the merits," there was no error in the Secretary's interpretation of the "open market" exemption. The court specifically rejected petitioners' contentions "that the open market provision exempts bituminous coal from the Act, or that error otherwise impairs the validity of the Secretary's determination or of the District Court's judgment" (Pet. App. 3a–4a).

Petitioners state (Pet. 5) that the Court of Appeals held that "though the Secretary erred in ruling that the 'open market' exemption issue could not be raised by Petitioners in the administrative proceeding," the claimed exemption did not exist as a matter of statutory construction. But while the court disagreed with the Secretary's argument that judicial review of the "open market" issue was not appropriate *in this action* (the Secretary's view being that this issue related to the applicability of the *Act* rather than to the "applicability of * * * such wage determination"), there is nothing in the opinion holding that the Secretary erred in any ruling "in the administrative proceeding." On the contrary, the court decided the "open market" issue on the basis that petitioners themselves had presented it, as a question "of statutory interpretation," judicial disposition of which did not depend upon "an administrative hear-

ing upon the applicability of the exemption" (Pet. App. 3a, fn. 4). Petitioners also err in stating that the Court of Appeals "did not expressly uphold the validity of the Regulation [administrative interpretation] as such * * *" (Pet. 5). In response to petitioners' own explicit presentation of the "open market" issue, on the appeal, as being solely the question whether the Secretary's *"regulation* interpreting the exemption is correct as a matter of law" (Appellants' Brief in the C. A. D. C., p. 20, and "Questions Presented," p. (i), emphasis added), the court did sustain the regulation. The reasoning of the opinion leaves no doubt of this. It is directed entirely to the terms and purposes of the statute and to the legislative history bearing on the validity of the Secretary's interpretation. The court ruled (Pet. App. 4a, 6a) that, although the language of the exemption "considered alone" might be ambiguous, this language in the context of the whole statute and its purposes, together with the "historical, legislative, and administrative material bearing on the problem", resolved any ambiguity in favor of the Secretary's interpretation.

ARGUMENT

The unanimous decision of the Court of Appeals, upholding the long-standing administrative interpretation of the "open market" exemption of the Walsh-Healey (Public Contracts) Act, which Congress has accepted and declined to change through the years, is so clearly correct that review by this Court is not at all necessary. Admittedly, the decision is not in con-

flict with that of any other court of appeals, or of any district court. Although the question is unquestionably one of national importance, in the sense that a contrary decision would so restrict the scope of the Walsh-Healey Act as virtually to nullify it, we believe that the decision of the Court of Appeals adequately, as well as correctly, resolves any current or impending problem.

1. The court's interpretation of the "open market" exemption is clearly correct. As is convincingly demonstrated by the opinion below, any ambiguity in the bare language of the exemption provision is resolved by "the context of the whole statute" and by consideration of the statutory purposes and the long post-legislative and administrative history.

The fact that the administrative interpretation was adopted over 20 years ago by the officials "charged with the responsibility of setting its machinery in motion * * * while * * * yet untried and new" (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 549), has been consistently adhered to by the successive Secretaries of Labor and all other interested Government procurement agencies concerned with the application of the Act, and has been continuously accepted by the Congress for purposes of annual appropriations, sufficiently establishes, we submit, the soundness of the decision. *United States* v. *American Trucking Assns., id.* at 544; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Alstate Construction Company* v. *Durkin*, 345 U. S. 13, 17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270. These considera-

tions are especially controlling in any judicial review of the administration of the Public Contracts Act which regulates only Government, not private, business (see *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 at 127, 129). As this Court observed in the *Lukens Steel* case (310 U. S. 113 at 127–128):

> * * * Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

There is thus particularly compelling reason for the conclusion that the courts should "decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Alstate*, 345 U. S. at 17.

Petitioners' view of the "plain meaning" of the statutory language and of the "unambiguous" legislative history at the time of its enactment (Pet. 11) has not been shared either by the Congress, by any of the Government officials responsible for the administration of the Act, or by either of the courts below. The statute, on its face, as the opinion below specifically shows, is replete with other provisions inconsistent with petitioners' sweeping interpretation of this exemption—an interpretation which would exclude from the Walsh-Healey Act *seven-eighths* of the

Government procurement clearly within the scope of the basic purposes of the Act.[1a]

And that the "plain meaning" did not require or warrant such an expansive interpretation of this exemption was recognized at the outset by Congress when called upon to make the first appropriation for the administration of the Act. The specific administrative interpretation here in issue was then deliberately accepted by the Congress as a basis for supplying funds for the Act's administration. In the first appropriation for the Labor Department's administration of the Act, the pertinent Committee noticed that, if an expansive interpretation of the exemption like the one advanced by the petitioners were adopted, the Act would apply to only one-eighth of the Government procurement to which it applies under the interpretation of the Secretary of Labor. So that Congress might make appropriation in an amount commensurate with the administrative and enforcement work involved, the Committee inquired of the Comptroller General which of these two interpretations should be accepted by the Congress for the purpose of the annual appropriation (H. Rept. 433, 75th Cong., 1st Sess., p. 25). Addressing himself to

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[1a] The report on the bill making the first appropriation for administration of the Act stated that if such a broad "construction had been placed upon the words of the act the field in which the statute would operate would be considerably narrowed. (It was testified that whereas between 3,500 and 4,000 contracts are now covered by the act, such a construction of the law would reduce the number of contracts to be considered to about 500)." H. Rept. No. 433 on Appropriations Bill for Fiscal Year 1938 (75th Cong., 1st Sess.), p. 25; 81 Cong. Rec. 2771.

the interpretation which petitioners urge, the Comptroller General concluded (81 Cong. Rec. 2771):

> To permit such exemptions under the present act, which relates only to supply contracts, would so restrict its operation as practically to nullify its other provisions. Consequently, as between that interpretation and the one adopted by the Secretary of Labor, I felt compelled to accept the latter—the plain terms of the provision being such as to admit of only one or the other of those two interpretations.
>
> Accordingly I have to advise that unless and until the matter be clarified by further legislation, I am constrained to concur in the interpretation placed on the provision by the Department of Labor.

As pointed out in the opinion below (see Pet. App. 6a, fn. 5), after the receipt of the Comptroller General's opinion, the chairman of the House Appropriations Committee moved to restore a cut which had been made in the appropriations for the administration of the Walsh-Healey Act on the specific ground that the effect of the Comptroller General's decision "is to considerably expand the activities of this division over what would have been required had the interpretation favored by our subcommittee been placed on the law" (81 Cong. Rec. 2770). Congressman Healey (the main sponsor of the Act, which bears his name) expressed his gratification "that the doubts of the subcommittee on appropriations concerning the proper interpretation of section 9 of this act have been cleared by the ruling of the Comptroller General," and stated that the opinions of the

Comptroller General and of the Department of Labor "in my judgment, clearly reflect the intent and purpose of Congress in the passage of this act" (*id.* at 2772).[2] This amendment to restore the cut in appropriation was then adopted by the House (81 Cong. Rec. 2773) and became law (50 Stat. 299 (1937)).

The interpretation thus adopted has been followed ever since. In the intervening years, the courts have been called upon many times to enforce the several provisions of the Act, almost invariably where petitioners' interpretation of the "open market" exemption would have been a complete defense. However, there evidently has been so little confidence in the soundness of petitioners' interpretation that in none of these numerous cases has the "open market" exemption even been mentioned, although they involved commonplace articles that can usually be bought in the open market by purchasers generally.[3]

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[2] This clear-cut statement by Congressman Healey refutes petitioners' reliance on their interpretation of Congressman Healey's earlier statements which patently do not afford any clarification of this question (Pet. 12–13).

[3] See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (iron and steel); *United States* v. *Smoler Bros.*, 187 F. 2d 29 (C. A. 7—women's cotton wearing apparel); *United States* v. *Hudgins-Dize Co.*, 83 F. Supp. 593 (E. D. Va.—tents and haversacks); *United States* v. *Sweet Briar, Inc.*, 92 F. Supp. 777 (W. D. S. C.—cotton underwear and shorts); *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (shoes); *United States* v. *Ozmer*, 181 F. 2d 508 (C. A. 5—lumber); *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915 (mosquito bars); *United States* v. *Craddock-Terry Shoe Corp.*, 178 F. 2d 760 (C. A. 4—shoes); *United States* v. *Harp*, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816 (canned poultry);

Each of the several Annual Reports of the Secretary of Labor to the Congress made thereafter, and each Annual Report made by the Administrator of the Public Contracts Division, plainly reveals that the Walsh-Healey Act was being applied to purchases of ordinary commodities such as the public usually makes in the open market.[4]

Lance v. *United States*, 190 F. 2d 204 (C. A. 4), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915 (peanut butter crackers); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59 (flares and fuses); *Reynolds Corp.* v. *Morse*, 174 F. 2d 159 (C. A. D. C.—aluminum); *United States* v. *W. H. Kistler Co.*, 200 F. 2d 805 (C. A. 10—books); *United States* v. *Warsaw Elevator Co.*, 213 F. 2d 517 (C. A. 2—hinges and screws); *Ready-Mix Concrete* v. *United States*, 130 F. Supp. 390 (C. Cls.—crushed stone and gravel); *In re Thrift Packing Co.*, 100 F. Supp. 907 (N. D. Texas—canned meat, hash, and chili con carne); *United States* v. *Standard Pharmical Co.*, 17 Labor Cases Para. 65,460 (S. D. Ill.—fruit powder); *United States* v. *Old Dominion Mfg. Co.*, 8 WH Cases 616 (E. D. Va.—mattress covers and tents); *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C. A. 2—alcohol); *United States* v. *Hedstrom*, 8 WH Cases 302 (N. D. Ill.—lighting fixtures); *United States* v. *Davis, d/b/a Textile Products Industries*, 9 WH Cases 340 (N. D. Ill.—cotton duck); *United States* v. *Rippetoe*, 17 Labor Cases Para. 65,324 (E. D. S. C.—tents); *United States* v. *B. & W. Sportswear*, 53 F. Supp. 785 (E. D. N. Y.)—jackets); *United States* v. *Standard Ice Co.*, 18 Labor Cases Para. 65,798 (D. C. Ark.—ice); *United States* v. *Duro-Wear Shirt Co.*, 22 Labor Cases Para. 67,224 (D. Conn.—shirts); *United States* v. *Garfunkel Makers*, 199 F. 2d 759 (C. A. 2—hats and caps); *United States* v. *Negri, d/b/a General Dairy Products Co.*, 22 Labor Cases Para. 67,297 (D. Minn.—dried milk); *Ready-Mix Concrete Co., Ltd.* v. *United States*, C. Cls. No. 49279, decided January 15, 1958 (ready-mix concrete).

[4] Annual Report of the Secretary of Labor, Fiscal Year Ended June 30, 1936, at 6; *Ibid.*, 1937, at 34–40; *Ibid.*, 1938, at 2, 16–53; *Ibid.*, 1939, at 6, 35–44; *Ibid.*, 1940, at 5, 32–49;

Despite efforts to write petitioners' interpretation into the statute by amendment (as the Comptroller General's 1937 opinion suggested should be done before doubts could reasonably be resolved against the Secretary's interpretation), Congress has refused to amend the Act. Just as the Fulbright Amendment involved rejection of a proposal to write expressly into the Act a definition of "locality" different from the long-standing administrative interpretation,[5] so was there, at the same time and under the same conditions, a like unsuccessful attempt to write expressly into legislation a proposal designed directly to accomplish petitioners' present objective as to the "open market" exemption. Senator Fulbright had offered a proposal[6] to amend and substitute for the present "open market" purchase language the following:

> This Act shall not apply to purchases of such materials, supplies, articles, or equipment of standard type and construction as are usually

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Ibid., 1941, at 13–14, 27–51; *Ibid.*, 1942, at 34–37; *Ibid.*, 1943, at 36–43; *Ibid.*, 1944, at 61–71; *Ibid.*, 1945, at 8–13; *Ibid.*, 1946, at 177–196; *Ibid.*, 1947, at 96–104; *Ibid.*, 1948, at 85–92; *Ibid.*, 1949, at 86–96; *Ibid.*, 1950, at 48–56, 193–318; *Ibid.*, 1951, at 134–135; *Ibid.*, 1952, at 16–18, 103–104; *Ibid.*, 1953, at 81–82; *Ibid.*, 1954, at 25, 29–30.

[5] See *Covington Mills et al.* v. *Mitchell*, 225 F. 2d 506 (C. A. D. C.); certiorari denied, 350 U. S. 1002; *Alabama Mills, Inc.* v. *Mitchell*, 244 F. 2d 21 (C. A. D. C.), certiorari denied, 355 U. S. 834.

[6] See Senator Fulbright's proposed amendment to Section 9, Hearings on Defense Production Act Amendments of 1952 before the Senate Committee on Banking and Currency, on S. 2594 and S. 2645, 82nd Cong., 2d Sess., Part 5, p. 2473.

> sold in the open market to purchasers generally, regardless of the method of procurement used by the Government.

When certain Senators proposed to offer an amendment to strike the entire Fulbright proposals, Senator Fulbright offered the compromise measure (Section 10 (c), Pet. App. 12a) which was simply designed "to leave to the courts the decision as to what is the proper interpretation to be made of the Act" (98 Cong. Rec. 6529). He admitted that this compromise proposal—

> does not constitute any change whatever in the substantive law. In view of the long history of the Walsh-Healey Act—in other words, it has been on the statute books since 1936—I realize that there will be some resistance, no matter whether I am correct with respect to my interpretation of the original intent of Congress. Nevertheless, I am perfectly willing to allow the courts to determine the correctness of the interpretation of the Act, as made by the Secretary of Labor. [*Id.* at 6530.]

Thus, while the Fulbright Amendment as finally enacted into law provided for court review of the administrative construction of "open market," it significantly failed to include the proposal to change the present "open market" as well as the "locality" language as it had been administratively interpreted. The Amendment was obviously designed by its sponsor to refer these questions to the courts on the basis of the original intent of Congress, but it is plain that it was a compromise with other members of Congress who felt that the existing administrative construction

was correct and who undoubtedly expected weight to be attached to the 16 years of administrative and legislative experience under the Act.

The importance of this long history of administrative practice and legislative acquiescence cannot be minimized by characterizing it as a "bootstrap" argument because "the Secretary's interpretation was immune from attack" until the Fulbright Amendment in 1952 (Pet. 10). The fact that the interpretation may have been immune from challenge in the courts, far from affording reason for its judicial repudiation now, is added reason for its acceptance. For, during all of these years when the administrative interpretation was certainly not immune from Congressional review, Congress deliberately allowed the interpretation to become the established law. In these circumstances, such a substantive change in the law as would result from reversal of the long-standing administrative interpretation is clearly a decision to be made by Congress rather than by the courts.

2. The "in limine" reason assigned by petitioners as supporting the grant of the writ—that the Secretary had not ruled, in the administrative proceeding, on the content of the "open market" exemption—is entirely without substance. Not only is it premised on petitioners' mistaken assertion that the decision below decided an issue "in the absence of a definite ruling thereon by the Secretary" (Pet. 7), but it is directly contradictory to petitioners' own insistence before the Court of Appeals that the "practical effect" of the Secretary's wage determination was "a decision on the merits of the regulation [interpreting

the open market exemption]" which "decided adversely at the administrative level" the issue of "applicability" of the wage determination raised by petitioners in this action (see the Statement, *supra,* pp. 4–5). While it was the Secretary's view that his separate regulation interpreting the "open market" exemption was not reviewable in an action for judicial review of the wage determination, he did not deny that the practical effect of the separate regulation was a decision that this exemption did not exclude all purchases of bituminous coal from the Act, or, therefore, from the application of the wage determination. As the Court of Appeals' opinion indicates (Pet. App. 3a, fn. 4), petitioners themselves conceded below that there was no need to remand for an administrative hearing on the applicability of the exception. It was on this undeniable premise—*i. e.,* that the "wage determination is purportedly applicable" to the bituminous coal industry (see Pet. App. 3a)—that the Court of Appeals, accepting petitioners' own affirmation that the issue had already been "raised and decided adversely at the administrative level" (see the Statement, *supra,* p. 4), concluded that the issue was reviewable in this proceeding and decided it.

In other words, as petitioners themselves presented the issue on appeal, it was solely whether the "open market" exemption in Section 9 of the Act "would apply to all government procurement in this industry" (Appellants' Brief in the C. A. D. C., p. 24), which, as the Court of Appeals noted, was simply a question of statutory interpretation (Pet. App. 3a, fn. 4). Whether or not this question of statutory interpre-

tation was determined in the *wage determination* proceeding, it had definitely been administratively determined "in the first instance" by the earlier general regulation issued by the Secretary (*supra*, p. 3). In these circumstances, petitioners' charge (Pet. 7) that the Court of Appeals violated the "salutary rule that the [administrative] agency should make the determination in the first instance" is, to say the least, surprising. Moreover, even if the point had more substance, it would not be available to petitioners here since they deliberately did not raise it below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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